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Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

NO.

Georgia Power Company,
Petitioner,

vs.

The United States of America,
Respondent.

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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QUESTION PRESENTED

Where members of the public are specifically authorized by the Corps of Engineers to operate sailboats for recreational purposes on a government lake, and where such authorized use constitutes a substantial interference with the rights of a private electric utility to operate and maintain over the lake an electrical transmission line pursuant to an easement granted by the Corps of Engineers, may the United States escape its obligation to pay just compensation for such taking?

In conformity with Rule 28.1, the Petitioner makes the following disclosure:

The Southern Company (parent firm);
Alabama Power Company (affiliate);
Gulf Power Company (affiliate);
Mississippi Power Company (affiliate);
Southern Company Services, Inc.(affiliate);
Southern Electric Generating Company (subsidiary).

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OCTOBER TERM, 1980

NO. _____

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PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

OPINION BELOW

The decision of the Court of Claims is reported in __ Ct. Cl. __ and F.2d __ and appears as Appendix A hereto. The Court of Claims order on rehearing is unreported and appears as Appendix B hereto.

JURISDICTIONAL STATEMENT

The judgment of the Court of Claims was rendered and entered on July 16, 1980. A timely petition

for rehearing en banc was denied on October 3, 1980. This Court has jurisdiction under the provisions of 28 U.S.C. § 1255(1).

STATUTES

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STATEMENT OF THE CASE

The Petitioner, Georgia Power Company, is a regulated public utility furnishing electricity to most of the citizens of Georgia. In 1926, it constructed a transmission line between Toccoa and Augusta, Georgia, under easements acquired from private landowners. The lands over which the easements were located were condemned by the United States in 1951 to create Clark Hill Reservoir. Rather than condemning the easements, the United States negotiated with the Petitioner to move its line to another location over the lake in exchange for cash and a conveyance from the government which was to provide the Petitioner rights "equivalent to the right surrendered. . . ."

Pursuant to this agreement, the United States conveyed to the Petitioner a "perpetual easement" to maintain its transmission line over the condemned

lands. Although the metes and bounds of the easement were described, the easement was silent as to the height at which the lines were to be strung. Following discussions with the Corps of Engineers (hereinafter referred to as the "Corps"), the line was built at a height of twenty-five feet, and there it remained with no problems for approximately twenty years.[1]

The easement relieved the United States from liability for injury or damage arising from the use or occupation of the premises by the Petitioner and required the Petitioner to inspect the line at reasonable intervals and promptly repair any defects, and further provided that the use and occupation of the land "shall be subject to such rules and regulations regarding ingress, egress, safety . . . as the District Engineer . . . may from time to time prescribe." (It should be noted that no such rules or regulations have ever been prescribed.) However, there was no provision requiring the Petitioner to remove or relocate the line at its expense in the event of any change in the use of the lake.[2]

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[1] Whether the Corps actually prescribed a twenty-five foot elevation or whether this was simply specified by the Corps as a minimum height is irrelevant; it is undisputed that, with the full knowledge of the Corps, the lines were strung at that height and remained there without objection until they were raised in 1977.

[2] The Corps had submitted a draft of a proposed easement to Petitioner which was rejected because its terms could possibly be used to justify a later forced removal, a condition Petitioner obviously was unwilling to agree to since this was entirely different from the rights it was giving up.

It is clear, though not specifically documented in the record, that recreational sailing on lakes was not overly popular in the early 1950's, and high-masted sailboats on lakes were unknown. Without being able to predict what the future held in store for this sport, it was quite logical for both parties to believe, as the record shows to have been the case, that a clearance of twenty-five feet was ample for any use to which Clark Hill Reservoir might be put.

The newly-relocated transmission line was erected within the bounds of the easement at a height of twenty-five feet and was energized in 1952. Thereafter, the Petitioner undertook a program of regular inspection to assure that its facilities remained in safe and serviceable condition, and the transmission line stood free of interference for two decades.

In May, 1971, the Petitioner was informed that the mast of a sailboat had nearly made contact with the line, and this incident prompted the parties to begin discussions on the potential hazard posed by recreational boating. Six months later, the Corps formally requested the Petitioner to raise its line above twenty-five feet; the Petitioner agreed to do so if the United States would absorb the necessary cost. The Corps did not immediately respond to this proposal, but did place warning buoys near the line and indicated its existence and the available clearance on navigational maps.

Nothing further transpired until April 29, 1973, when a sailboat with a mast measuring twenty-eight feet contacted the line, killing one person and seriously injuring others. This accident proved not only

that recreational use of the reservoir was incompatible with continued maintenance and operation of the line at the original twenty-five foot height, but also that the limited safety precautions taken by the Corps were ineffective to prevent collisions by private boats.

Despite repeated inquiries by the Petitioner for a decision on government assumption of relocation costs, the Corps would only advise that an investigation and engineering study was underway. It was not until February 24, 1977, that the Corps finally informed the Petitioner that it would neither accept responsibility for any future accidents nor bear the expense of raising the line, even though at the same time the Corps acknowledged that it had a duty to assure public safety, that it had not been able to do, and that the only way to protect the public users of the lake was to raise the line.

It was not until after this communication that the Petitioner learned of the seriousness and extent of the hazard posed by recreational boating. According to the government's own figures, by mid-1975 the percentage of sailboats using Clark Hill Reservoir which were unable to negotiate the transmission line had already reached forty-seven percent. The Corps further projected that the reservoir would eventually accommodate boats with seventy-five foot

masts and that, in the near future, projections of fifty-two feet could be expected.[3]

The development of Clark Hill Reservoir was part of an overall scheme to improve the Savannah River basin in Georgia and South Carolina and was formally authorized by Congress in December, 1944. Pub. L. 78-534 (1944). As expressed in the Definite Project Report, the development was intended to promote "hydroelectric power, improvement of navigation, and other purposes."

Limited recreational use by the public was also envisioned under the rules and regulations to be promulgated by the Corps. Even then, it was planned to allow only such public access as would compliment operation of the project for its major purposes and assure public safety.

> The operation of boats, . . . for fishing and recreational use is permitted except in prohibited

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[3] The court below decided there was insufficient proof of the inevitability of recurring accidents necessary to give rise to a substantial interference with the Petitioner's property, July 16, 1980, Slip Opinion, at 4, fn. 5, relying upon the Corps' Deputy Director of Civil Works, who concluded: "For the most part, the nonconforming crossings are located in coves and not in the main channels used by the sailboats." The court ignored the fact that there were crossings that were readily accessible as evidenced by the 1971 and 1973 incidents, and further ignored the effect on other crossings resulting from raising the affected crossings. In any event, whether all or only some of the crossings needed additional clearance is immaterial for the purposes of this appeal and can be handled appropriately on remand.

> areas designated by the District Engineer in charge of the reservoir area . . . .

36 CFR § 311.3(a).

The Petitioner, whose property interests at Clark Hill Reservoir were narrowly circumscribed by the easement, had no ability on its own to restrict access to those portions of the reservoir crossed by its transmission line only to boats able to pass under it. The Corps, however, had such authority and as early as November, 1971, when it requested that the Petitioner raise the transmission line, assured the Petitioner that regulations would be issued to prevent future incidents, but only after the line had been raised from its original twenty-five foot height.

The inconsistency between the government's willingness to prevent by regulation future, unanticipated interference by private boats and its refusal to eliminate the acknowledged, existing interference was never resolved, the Corps protesting that any decision could only be made after "full public participation." No such participation was even solicited until after work to relocate the line had been largely completed.

By the latter part of 1977, a number of facts had become evident. First, the Corps had permitted a use of Clark Hill Reservoir to develop that was incompatible with the Petitioner's twenty-five foot high transmission line. Second, the inconsistent use of the reservoir was widespread and would continue to grow more serious in the future. Third, the safety precautions that had been taken would not

prevent collisions with the transmission line. Fourth, the Petitioner had no control whatsoever over use of the reservoir and thus could not take any additional, more effective measures. Finally, the Corps had determined to compel relocation of the transmission line by refusing to take action within its authority to stop or to minimize the incompatible use of the reservoir, thus exacerbating the problem and for all intents and purposes rendering it permanent.

Based upon these considerations, the Petitioner was forced to raise its transmission line to the elevation specified by the Corps in its November, 1971, "request." The Petitioner's action to recover the actual cost of construction, $802,348.00, was filed shortly thereafter in the United States Court of Claims under authority of 28 U.S.C. § 1491.

ARGUMENT

Notwithstanding legal technicalities and semantic niceties, it is indisputable that the Petitioner has lost a vested property right at a cost of over $800,000 solely for the benefit of a limited public use. Should the electric ratepayers of Georgia who have gained nothing but lost a substantial investment be forced to pay for the public's use of the Petitioner's easement? Or should the price of the public's gain be borne by the public?

This Court is committed to the proposition that the "Fifth Amendment's guarantee . . . [is] designed to bar Government from forcing some people alone to bear burdens which, in all fairness and justice,

should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960), quoted approvingly in *Penn Central Trans. Co. v. City of New York*, 438 U.S. 104, 123 (1978). This Court has also made clear that, while there can be no set formula for determining when justice and fairness require that economic injuries caused by public action be borne by the Government rather than remain disproportionately concentrated on a few persons, the circumstances of each case must be examined essentially on an ad hoc basis. *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

The central issue, therefore, is whether it is fair in the context of this case to force one corporate entity to bear the entire cost of relocating its facilities solely to accommodate the recreational public. Although this precise question appears to be one of first impression, guidelines announced by this Court as well as a sense of justice and fair play require a finding that there has been a taking by the United States for public purposes for which compensation is due the Petitioner.

In any event, the question is certainly one of grave import for the entire public utility industry and merits this Court's attention.

I.

Petitioner Had A Valuable Vested Property Right Which Has Been Effectively Destroyed

Although the lower court declined to decide whether the Petitioner had a vested, exclusive right to

maintain its line at a height of twenty-five feet, this is an essential element of the Petitioner's case and, hence, will be treated at the outset of the argument.

The original easements, while not specifying a particular height, did give the Petitioner the right to keep the line clear of all obstructions. (Even in the absence of such a provision, this right is inferred. *Georgia Power Co. v. Sullivan*, 217 Ga. 699, 124 S.E.2d 634 (1962).) The concomitant of this is the absolute and exclusive right to occupy a definite amount of airspace sufficient to accomplish the purpose of transmitting electricity without interference.

The fact that the easement is silent as to height means nothing. The universally accepted rule is that where the location of the easement has been established either by express terms or by use of a specific location, it becomes fixed and cannot be substantially changed without the consent of both parties. *Youngstown Steel Products Co. v. City of Los Angeles*, 38 Cal. 2d 407, 240 P.2d 977, 979 (1952). *See, United States ex rel. Tenn. Valley Authority v. Easement*, 249 F. Supp. 747 (W.D. Ky. 1966); Cf. *Kleinheider v. Phillips Pipe Line Co.*, 528 F.2d 837 (8th Cir. 1975); *Gaffney v. Pesce*, 144 Conn. 17, 126 A.2d 926 (1956); *Labounty v. Vickers*, 352 Mass. 337, 225 N.E.2d 333 (1967); *Swenson v. Strout Realty, Inc.*, 85 Nev. 236, 452 P.2d 972 (1969); *Umberger v. State ex rel. Department of Game*, 248 N.W.2d

395 (S.D. 1976); *Keesling v. City of Seattle*, 52 Wash. 2d 247, 324 P.2d 806 (1958).[4]

The fact that the easement placed a duty upon the Petitioner to maintain the line in a safe condition, to comply with safety rules, and to assume liability for damages resulting from maintenance and use of the line does not make the Petitioner a mere licensee subject to the whims of the grantor. Such an argument defies logic. The line was safe when built and has remained that way. The hazard has resulted from a change in the use of the water under the line, a change allowed to come about by the Corps and over which the Petitioner had absolutely no control. The line was built with the full expectation that a twenty-five foot clearance was adequate for all contemplated uses of the lake. Had the United States really expected later to require Petitioner to move the line, it would have said so in the easement, and certainly it never would have agreed in the relocation contract to give the Petitioner the same rights being voluntarily given up. It is obvious that the Petitioner would never have agreed to such a requirement; its easement rights would have had

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[4] The Court of Claims did not even address those cases that would preclude the United States, by virtue of its conduct in specifying the original height of the line, from ordering its removal. See *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); *Panhandle Eastern Pipe Line Co. v. State Highway Comm'n*, 294 U.S. 613 (1935); *Town of Essex v. New England Telegraph Co.*, 239 U.S. 313 (1915); *Cf. Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893); *Tenney Telephone Co. v. United States*, 82 F.2d 788 (7th Cir. 1936); *United States v. Bailey*, 467 F. Supp. 925 (E.D. Ark. 1979).

to have been condemned; and a much higher price would have been paid.

The value of the easement to the Petitioner rests wholly upon the purpose for which it was granted and the use to which it has been put. The importance of the twenty-five foot fixed elevation is in the continued, uninterrupted maintenance of existing facilities. The Petitioner paid for this right originally and it retained this right when relocating. The next question, then, is whether that property has been taken. (Again, the Court of Claims never specifically decided whether the interference complained of rose to the level of a taking but implied that it did not.)

Governmental interference with private property necessary to constitute a taking need not involve actual physical destruction of property. Under principles developed by this Court, it is sufficient that there has been a substantial interference with the owner's use and enjoyment of his property. See *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); *Griggs v. County of Allegheny*, 369 U.S. 84 (1962); *United States v. General Motors Corp.*, 323 U.S. 373 (1945). The Petitioner here has been subjected to property damage and liability for injuries to others; it has been informed that interference will likely continue because safety precautions are not effective; and it has been met with intransigence in response to its reasonable demand that remedial measures — effective regulations — to end the interference be taken by the Corps.

Admittedly, only one fatality occurred through direct contact with the transmission line before cor-

rective action was forced upon the Petitioner, but one cannot seriously contend that it was obliged to wait for additional accidents to occur in order to merit a recovery. The Petitioner's obligation, rather, is only to show that the interference will inevitably recur, see *United States v. Cress*, 243 U.S. 316 (1917); *Wilfong v. United States*, 202 Ct. Cl. 616, 480 F.2d 1326 (1973), and this burden can be satisfied other than by a body count.

For example, in *Dugan v. Rank*, 372 U.S. 609 (1963), the United States constructed a dam, the effect of which was to appropriate private water rights recognized by state law. Although the amount of water of which the plaintiffs would be deprived was certain to vary with day-to-day operation of the dam, this Court, nonetheless, found that a compensable taking had already occurred, based upon the government's "purpose and effect of subordinating" the plaintiffs' water rights to federal use "whenever it saw fit." 372 U.S. at 625.

The Court of Claims apparently found no plan or intent to deprive the Petitioner of its property for the reason that the Petitioner had never been ordered to relocate its transmission line, July 16, 1980, Slip Opinion, at 6, but if a formal, written demand were always required for governmental appropriation of private property, few, if any, cases for compensation would ever reach the courts. It is sufficient, rather, to infer such an intention from the facts. See *Dugan v. Rank, supra; Sun Oil Co. v. United States*, 215 Ct. Cl. 716, 572 F.2d 786 (1978); *J. J. Henry Co., Inc. v. United States*, 188 Ct. Cl. 39, 411 F.2d 1246 (1969).

By the summer of 1977, it became apparent that forcing a relocation had been the government's intent all along. As early as 1971 when the Corps was in the process of instituting its first safety measures, the government's operational manager at Clark Hill Reservoir was already "convinced that the only sure cure to the hazards posed . . . was a raising of the lines," and the November, 1971, letter "request" that a relocation be accomplished suggested an alternative height of fifty-four feet, even before an engineering design for relocation had been commissioned.

Having declined to bear the cost of relocating the line after six years of delay and knowing that other safety measures were inadequate, the Corps thereafter foreclosed the only other available solution—the exercise of its regulatory authority to stop the inconsistent use of the reservoir. This decision meant that conditions on the reservoir would be allowed to deteriorate until the Petitioner would be forced to relocate the transmission line on its own and expressed an attitude, perhaps, best summarized by the Corps' Deputy Engineer for the South Atlantic Division, who concluded: "If conditions become obviously unsafe it is considered that the utility companies, in the public interest, will assume responsibility for alterations without positive action by [the United States]."

There is no question but that the conditions in 1977 were "obviously unsafe." There had been one near miss which prompted certain safety measures, one tragedy in 1973 in spite of the safety measures, an increase in the number of sailboats using the lake, an increase in mast heights, and a projected, con-

tinued increase in numbers of boats and their mast heights. Aluminum masts and electric wires are wholly incompatible; each interferes with the safe operation of the other; the interference is not only substantial, it is lethal; under the Corps' regulations, the interference was bound to continue with deadly frequency. Hence, there was a taking of property without compensation.

II.

The United States Should Be Liable For A Taking Which Was Permitted By Its Regulations

The central legal issue is whether the Corps' scheme for regulating the manner in which the public might use the reservoir, which use by the public substantially interfered with the exclusive right of the Petitioner to use its easement, is sufficient to render the United States liable to compensate the Petitioner for this taking.

The Court of Claims, characterizing the Petitioner's position as one advocating a duty on the Corps to proscribe by regulations the use of the reservoir by high masted boats, July 16, 1980, Slip Opinion, at 6, held that there was no affirmative duty to do so. The Petitioner contends, rather, that, once the public was authorized by regulations to use the reservoir, a duty devolved on the Corps to regulate that use sensibly, reasonably and in a manner not knowingly inconsistent with the Petitioner's vested property rights.

The Court of Claims declined to find liability against the United States on the ground that no "taking" in a constitutional sense could be based upon a permissive regulatory scheme, thus characterizing the actions of the Corps as mere "discretionary inaction." July 16, 1980, Slip Opinion, at 5. It is, however, essential to realize that recreational boating at this reservoir exists *only* at the sufferance and under regulation of the United States.

The cases in which governmental regulation has resulted in a taking generally fall into either of two categories: (i) government regulation *mandates* a use of the property by others inconsistent with the owner's rights, see, *e.g., Griggs v. County of Allegheny,* supra; *United States v. Gerlach Live Stock Co.,* 339 U.S. 725 (1950); *United States v. Causby,* 328 U.S. 256 (1946), or (ii) government regulation *forbids* a use of the property by the owner, similarly inconsistent with his rights, see, e.g., *Goldblatt v. Town of Hempstead,* 369 U.S. 590 (1962); *Benenson v. United States,* 212 Ct. Cl. 375, 548 F.2d 939 (1977); see generally *Penn Central Trans. Co. v. City of New York, supra.* The regulation present in this case fits neatly into neither classification for it merely permits, but does not require, a use of the property inconsistent with the Petitioner's vested property rights.

The regulatory authority of the Corps necessary to end the interference posed by recreational boating exists under both statute, 16 U.S.C. § 460d, and published regulation, 36 C.F.R. § 327 et seq., and had formerly been implemented in part by rules of specific application to Clark Hill Reservoir, 36 C.F.R.

§ 311 et seq. Although the Petitioner does not contest the government's discretion to issue or to revoke rules governing use of the reservoir, where the regulatory process itself has caused an appropriation of private property, in this case, by the authorization of substantial interference with the Petitioner's transmission line, the constitutional mandate of compensation to the owner is invoked.

It is undisputed that in 1951 use of the reservoir by boats with masts and other projections exceeding twenty-five feet was completely unanticipated either by the Petitioner or by the Corps; and, consequently, the regulations promulgated by the Corps which permitted recreational boating found no occasion to address a contingency that neither party had been aware could ever develop. Such use of the lake at that time did not in any way interfere with the Petitioner's property.

However, throughout the period in which the inconsistent use posed by recreational boating was mounting to dangerous proportions, the regulations remained static, and their effect has been to allow the status quo to change, to permit the development of a substantial interference with the Petitioner's easement that did not exist when the reservoir was developed and the Petitioner installed its line. In effect, the United States has by regulation broadened the use of Clark Hill Reservoir and, in so doing, has appropriated the Petitioner's property for an expanded public use.

The government's invasion of the Petitioner's property in this case is the factual converse of its appropriation in *United States v. Causby*, 328 U.S.

256 (1946). In that case the plaintiffs maintained a chicken farm over which the government made low-level approaches for landing at a nearby airport. As a result of these overflights, the plaintiffs' business was largely destroyed.

The interest of the plaintiffs in *Causby* was to prevent government invasion of that portion of airspace immediately above their land necessary for the conduct of their business. There was no question of the government's right to use the airspace above that limit.

That the Civil Aeronautics Authority admittedly had authority to prescribe air traffic rules and had by regulation approved the landing approaches over the plaintiffs' land was found to be inconsequential. This Court found that a compensable, though partial, taking had occurred.

The Petitioner here maintained a comparable interest, not in prohibiting government intrusion into the space immediately above the waters crossed by the transmission line, but in preventing interference at a fixed height of twenty-five feet. Here, as in *Causby*, federal regulation permitting interference does not preclude finding that a taking has occurred.

What the United States appropriated in *Causby* was an easement for overflight, the effect of which was to impair the plaintiffs' use and enjoyment of their fee interest in the land. The United States in this case has reclaimed for its fee the Petitioner's vested interest in an elevation of twenty-five feet, the effect of which has been to impair the Petition-

er's use and enjoyment of its easement and to force the relocation of its transmission line. In both cases the taking is only partial but, nonetheless, compensable.

The Court of Claims, however, implied that the government's responsibility for the substantial interference with the Petitioner's vested property interest turns solely on whether government regulations specifically refer to mast height in their blanket authorization to the public for use of the reservoir. The distinction between "affirmative regulation" and "nonregulation" is one of semantics only because, in both cases, substantial interference with private property can be directly attributable to the same.

It is clearly obvious that, if the United States had issued a regulation permitting use of Clark Hill Reservoir only by boats with masts and antennae *exceeding* twenty-five feet in height, then given the substantial interference present here there would be a compensable taking. This is the "affirmative regulation" which most clearly leads to liability.

No substantial difference in analysis results if the United States by regulation authorizes use of Clark Hill Reservoir by boats without specifying mast and antennae heights. This is still "affirmative regulation" by the government permitting (and in fact resulting in) substantial interference with the Petitioner's property.

The effect of the Court of Claims decision is that the Corps' responsibility became "fixed" in 1951

and, inasmuch as sailing posed no problem with respect to the transmission line at that time, damage from any change in the status quo would have to be borne by the Petitioner. Such a position cannot be legally justified: the Corps' duty not to take private property without compensation is fixed, but the manner in which it discharges this duty must adjust as circumstances change. The initial taking of the Petitioner's property was for the purpose of changing the use of the land to a reservoir partly for recreation; the taking here complained of is for the purpose of expanding that use to accommodate a new recreational use, *i.e.*, high-masted sail boats.[5]

The Petitioner does not contend that liability of the United States for a taking of private property can be imposed whenever interference with private property in some manner implicates the government's regulatory authority. However, when activities are undertaken only because of government regulation, are known by the government to constitute and do in fact constitute such a substantial interference with private property so as to give rise to a constitutional taking of that property, such activities should be attributable to the United States and render it liable for compensation under the Fifth Amendment.

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[5] One would hardly argue that the taking of an avigation easement for small propeller planes as in *Causby* would prevent the chicken farm owner from recovering for an additional taking which would be caused by the giant Concorde using the airport. There can be more than one partial taking, each of which requires adequate compensation.

III.

The United States Is Liable For The Acts of The Third Party Users of The Reservoir

It is only by virtue of the government's permissive regulatory scheme that physical interference with the Petitioner's transmission line developed. The Court of Claims, however, was of the view that liability of the United States was too attenuated on the ground that "[i]t was the public boaters — independent third parties — who interfered with [the Petitioner's] use of the power line." July 16, 1980, Slip Opinion, at 6.

The "independent local action" rule as fashioned by the Court of Claims has been applied to relieve the United States from liability where another governmental entity has been found more directly implicated in objectionable actions. See, *e.g.*, *Minot v. United States*, 212 Ct. Cl. 154, 546 F.2d 378 (1976); *Garden Construction Co. v. United States*, 191 Ct. Cl. 172, 423 F.2d 273 (1970). However sound application of the "independent local action" rule may be in determining the identity of the proper party defendant, in this case, there is no other governmental entity involved on which responsibility can be placed, and application of that rule here would effectively

deprive the Petitioner of any judicial recourse to protect its rights.[6]

This Court has never sanctioned such a sweeping application of the rule to defeat vested property interests. In *Griggs v. County of Allegheny*, 369 U.S. 84 (1962), a landowner sued a municipal corporation for appropriating an avigation easement over his land necessary for operation of an airport. The facility was operated by the local government and planned under rules and regulations of the Civil Aeronautics Administration. This Court held that the municipal corporation was the party ultimately responsible for the interference.

> It is argued that though there was a "taking," someone other than [the municipal corporation] was the taker — the airlines or the C.A.A. acting as an authorized representative of the United States . . . . The Federal Government takes nothing; it is the local authority which decides to build an airport *vel non*, and where it is to be located. We see no difference between its respon-

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[6] In a proper case, injunctive relief is available to restrain interference with use and enjoyment of an easement. See, e.g., *United States v. Sea Gate, Inc.*, 397 F. Supp. 1351 (D.N.C. 1975); *Wiegmann v. Baier*, 203 N.W.2d 204 (Iowa 1972); *Metropolitan District Comm'n. v. Plotnick*, 354 Mass. 1, 234 N.E.2d 766 (1968); *Mobley v. Saponi Corp.*, 215 Va. 643, 212 S.E.2d 287 (1975). However, equitable relief may not be granted against the United States. See *Dugan v. Rank*, supra; *Cf. Hurley v. Kincaid*, 285 U.S. 95 (1932), and, thus, a failure to recover damages in the present action will effectively destroy the Petitioner's rights by foreclosing any remedy through which they may be enforced.

> sibility for the air easements necessary for operation of the airport and its responsibility for the land on which the runways were built.

Id., at 89.

The lower court only gave *Griggs* footnote treatment, considering that it was inapplicable because the third parties there, *i.e.*, the pilots, were required to use specified approaches to the airport. July 16, 1980, Slip Opinion, at 8, fn. 10. Admittedly, that factual difference exists, but this in no way detracts from the principle that the government cannot always hide behind the shield of third party conduct. If third parties, here members of the pleasure boating public, in furtherance of the authorized use of public lands, cause substantial interference with private property, then in all fairness and justice that liability must be borne by the public through its governing body. It must be remembered that these third parties are not independent; to the contrary, their very right even to be on the lake comes from the United States. The regulations here involve sanctioned interference with private property; the effect on the Petitioner is just as devastating as if the regulation had actually mandated such interference.

That a "taking" does not depend on the ultimate beneficiary of the government's appropriation was recognized by this Court most recently in *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), where the Corps insisted upon free public access to a privately-owned marina.

Here the Government's attempt to create a public

> right of access to the improved pond goes so far beyond ordinary regulation or improvement for navigation as to amount to a taking under the logic of *Pennsylvania Coal Co. v. Mahon*, [260 U.S. 393 (1922)] . . . .
>
> In this case, we hold that the "right to exclude," so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation.

Id., at —, 100 S.Ct. at 392, 393, 62 L. Ed. 2d at 345, 346. See *Pennsylvania Coal Co. v. Mahon*, supra.

Liability of the United States in this case does not depend on the fact that members of the public are directly benefiting from its appropriation of the Petitioner's property. The act of appropriation itself is directly traceable to the decision, by regulation, to provide for expanding public recreational use of Clark Hill Reservoir. Although the Petitioner nominally holds its electrical transmission line under easement, the effect of the Court of Claims' decision has been to relegate the Petitioner to the status of a mere licensee with no guarantee that, at some future time, the transmission line as located will accommodate an as yet unanticipated expansion of the public use. In the final analysis, it is the Petitioner and the electric rate payers throughout the State of Georgia who have been required to absorb the cost incurred in expansion of the recreational use of Clark Hill Reservoir.

CONCLUSION

For the reasons stated above, the Petitioner submits that a writ of certiorari to the United States Court of Claims should be issued.

Respectfully submitted,

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Dated: December 19, 1980

APPENDIX A

IN THE UNITED STATES COURT OF CLAIMS

No. 538-77

(Decided July 16, 1980)

GEORGIA POWER COMPANY
v. THE UNITED STATES

Robert L. Pennington, attorney of record, for plaintiff. *Richard G. Holloway, Herbert D. Shellhouse*, and *Troutman, Sanders, Lockerman & Ashmore*, of counsel.

Eric S. Gould, with whom was *Assistant Attorney General James W. Moorman*, for defendant.

Before NICHOLS, KASHIWA and SMITH, *Judges*.

ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

KASHIWA, *Judge*, delivered the opinion of the court:

This is a taking claim against the United States, before us on the parties' cross motions for summary judgment. Georgia Power Company (plaintiff) claims a taking of its electrical powerline easement which, allegedly, is vested 25 feet above full pool ele-

vation of the Clark Hill Reservoir.[1] The act complained of is defendant's failure to regulate mast and antenna heights of recreational sailboats used on the reservoir by the public.

Sometime shortly after 1977 plaintiff raised the powerline at issue to 54 feet above the reservoir's full pool elevation and now seeks to recover from the United States its costs expended therefor.[2] The United States never ordered plaintiff to raise its powerline. Plaintiff did so after a near accident in 1971 and a fatal accident in 1973 in which a passenger in a sailboat was killed when the mast of the sailboat struck plaintiff's powerline. Pursuant to a "hold harmless" provision in plaintiff's easement agreement executed with the United States on December 7, 1951, the Government was not financially liable for the damages resulting from the fatal 1973

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[1] This project involving the Savannah River Basin in Georgia and South Carolina was authorized by Congress on December 22, 1944, by Pub. L. No. 78-534. A Definite Project Report was approved on February 20, 1946, which stated the project was constructed for "hydroelectric power, improvement of navigation, and other purposes." Recreational boating on the reservoir is not an inconsistent use. The project was planned and is administered by the Army Corps of Engineers. 36 C.F.R. § 327 *et seq.*

[2] The present phase of litigation deals solely with the issue of liability. By agreement of the parties, the issue of the amount of damages is not before the court.

accident.[3] In addition, a report by defendant disclosed that, as of May 1975, 47 percent of the sailboats permanently moored on the reservoir had masts in excess of 25 feet (with the number predicted to increase).

Plaintiff requested defendant pay for the raising of the powerline. Defendant, acting through the Corps of Engineers, refused, claiming, *inter alia*, insufficient justification. According to Brigadier General Drake Wilson, Deputy Director of Civil Works:

> * * * For the most part, the nonconforming crossings are located in coves and not in the main channels used by the sailboats. Other crossings are located in areas where the practical recreational use of a sailboat is limited by bridges and certain natural constraints.

Prior to the construction of the reservoir, plaintiff was in possession of powerline easements on its Toc-

---

[3] Condition 7 of the easement agreement provides:

"That the United States shall not be responsible for damages to property or injuries to persons which may arise from or be incident to the use and occupation of the said premises, nor for damages to the property of the grantee, or for injuries to the person of the grantee (if an individual), nor for damages to the property or for injuries to the person of the grantee's officers, agents, servants, or employees, or others who may be on said premises at their invitation or the invitation of any one of them, arising from or incident to governmental activities, and the grantee shall hold the United States harmless from any and all such claims * * *."

See Condition 8, *infra*.

coa-Augusta powerline, portions of which traversed land which was subsequently flooded. Negotiations between plaintiff and defendant began in 1945 regarding the status of this Toccoa-Augusta powerline. Rather than condemning the portions of the powerline easements soon to be flooded, by agreement dated February 26, 1951, plaintiff and the United States negotiated a removal and relocation of the powerlines, at the expense of the United States (totaling $232,800). Pursuant to this agreement, on December 7, 1951, plaintiff was given an "easement or right of way" traversing portions of the Clark Hill Dam and Reservoir Project, which was to be "equivalent to the right surrendered by [plaintiff] on the land from which the facilities are removed * * *."[4] Thereupon, plaintiff constructed the powerline at a height of 25 feet above the reservoir's full pool.

Plaintiff argues it possessed a vested property interest in a powerline easement at 25 feet above full pool elevation. Additionally, plaintiff claims defendant's nonregulation of the height of masts and antennae is a type of "affirmative regulation" constituting permission to use the reservoir by boats which cannot negotiate under the powerline. After consideration of the briefs and oral argument, we hold for defendant and find no taking by the United States.

Even assuming plaintiff did have a vested property interest in a powerline easement at 25 feet above

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[4] No reference to the height of the powerline was contained in this easement or any of the easements surrendered.

full pool elevation (which we find unnecessary to decide), there was no taking upon which the plaintiff may recover because the interference complained of constituted acts of independent third parties. As such, there is no Fifth Amendment liability on the part of the United States, a rule of law earlier held in a case analogous to the controversy at hand. *Minot v. United States*, 212 Ct. Cl. 154, 546 F.2d 378 (1976). *See also United States v. General Motors Corp.*, 323 U.S. 373 (1945).

In *Minot* the United States had a 34-kilovolt electrical powerline easement over the plaintiff's property. The United States entered into a powerline pooling agreement with the Guam Power Authority (GPA), a public corporation of the Government of Guam, possessing the power of eminent domain and the power to sue and be sued in its own name. This pooling agreement allowed GPA to use the easement possessed by the United States. Subsequently, and without authorization, GPA erected a 115-kilovolt powerline involving, for example, much larger support towers on plaintiff's property. Plaintiff argued GPA's action amounted to a taking by the United States. The court denied plaintiff's taking claim because (1) the permit issued to GPA by the United States "did not authorize GPA to do anything that the Government had not the common law right to allow it to do," and (2) any "condemnation" of plaintiff's land by GPA's action was the result of independent local action for which the United States was not liable. 212 Ct. Cl. at 159, 546 F.2d at 381. Similarly in the instant case, the facts do not reveal any interference by the United States. It was the public boaters—independent third parties—who in-

terfered with plaintiff's use of the powerline.[5]

At the time the negotiations to relocate plaintiff's powerline were taking place (in the early 1950's), it was unanticipated by either party that boats with masts tall enough to come in contact with the powerline would ever be used on the reservoir. Also, from the time of these negotiations to the time of the accident, the same regulation containing no restriction on the height of either masts or antennae was in force. In short, there has never been any regulation by the Government of the size of either mast or antenna heights allowed on the reservoir. Although plaintiff argues defendant fixed the height of the powerline at 25 feet, we feel the facts more properly establish that defendant only required a minimum height of 25 feet above full pool elevation.[6] Defend-

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[5] There was only one act of direct interference with plaintiff's powerline (the fatal accident), plus the large percentage of "nonconforming" sailboats. On its face, this one accident plus the near accident is only an "intermittent interference," and we do not hold that plaintiff has proven a recurrence was inevitable—constituting a sufficient appropriation for a taking. *See Wilfong v. United States*, 202 Ct. Cl. 616, 622, 480 F.2d 1326, 1329 (1973). *Accord, North Counties Hydro-Electric Co. v. United States*, 138 Ct. Cl. 380, 382-383, 151 F. Supp. 322, 323, *cert. denied*, 355 U. S. 882 (1957); *National By-Products, Inc. v. United States*, 186 Ct. Cl. 546, 576-577, 405 F.2d 1256, 1273 (1969).

[6] We do acknowledge that since defendant was paying for the powerline to be relocated it would attempt to keep the costs low, thereby seeking a lower relocation height than plaintiff might possibly have desired. However, at best, that would merely have been a conflicting negotiating position. Nothing presented to us indicates defendant possessed unusual leverage to force plaintiff to assent to a maximum height of 25 feet against its will.

ant asserts before us that the 25-foot clearance was consistent with the then existing standards of the National Electric Safety Code. Further, it is clear from the December 7, 1951, easement agreement that the risk of the powerline becoming dangerous was allocated solely to plaintiff. Condition 8 of the easement agreement provides:

> That the United States shall not be responsible for damages to property or injuries to person which may arise from or be incident to the construction, maintenance, and use of said line.

Condition 4 of the easement agreement provides:

> That the grantee shall supervise the said line and cause it to be inspected at reasonable intervals, and shall immediately repair any defects found therein as a result of such inspection, or when requested by said officer to repair any defects. Upon completion of the installation of said line and the making of any repairs thereto, the premises shall be restored immediately by the grantee, at the grantee's own expense, to the same condition as that in which they existed prior to the commencement of such work, to the satisfaction of the said officer.

Also, we find Condition 3, which is reprinted in the margin,[7] placed plaintiff on notice that it would not

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[7] Condition 3 of the easement agreement provides:

"That the use and occupation of said land incident to the exercise of the privileges hereby granted shall be subject to such rules and regulations regarding ingress, egress, safety, sanitation, and security as the District Engineer, Savannah District, may from time to time prescribe."

be indemnified for any modifications necessary in, e.g., the interest of public safety. *See also* Condition 7, *supra* at note 3. A change in the status quo of the boats using the reservoir, rendering the use of the powerline dangerous, falls within the provision of the above-quoted Conditions.

Additionally, although plaintiff asserts quite vigorously that defendant should have issued regulations proscribing the use of the reservoir by boats with mast or antenna heights tall enough to come in contact with the powerline, plaintiff has not proven this was an affirmative duty imposed on the defendant. To the contrary, we feel the issuance of such regulations is merely a discretionary act, and a taking may not result from this discretionary inaction. Indeed, after the near accident in 1971, defendant did post buoys and signs and mark navigational maps to warn of the potential hazard.[8] Hence, reasonable actions were taken by the Corps of Engineers to warn the public of the potential hazard. Thus, while it is true the Government could have done more, it did take reasonable actions to discharge its responsibility to protect the safety of the boating public. Referring back to the analysis of Brigadier General Drake Wilson, the powerline did not cross at main channels but, rather, in areas where sailboating is limited by natural or artificial constraints. Unfortunately, the Corps' actions did not guarantee there would be no accidents, but we cannot hold the defendant's assessment of, and reaction to, the safety problem was improper under the cir-

[8] No evidence has been produced that such buoys, signs, and other warnings were not properly maintained.

cumstances. Neither can we agree with plaintiff's assertion that the "[d]efendant knowingly abdicated its responsibility to assure public safety, forcing the plaintiff to assume this duty by default." It was not assumed by default. The United States and plaintiff allocated the obligation to maintain the safe operation of the powerline to the plaintiff. Also, after placing the warnings of the potential danger presented by the powerline, it thereupon became the obligation of the operators of the vessels to abide by such warnings—any disregard thereof, either intentionally or negligently, is not an act authorized by the United States.

Plaintiff maintains its powerline was "safe" within the meaning intended by the Conditions to which the easement is subject, averring what is unsafe is boating underneath the powerline, an act "specifically authorized" by defendant. We disagree. Plaintiff's interpretation of the above-mentioned Conditions is too narrow and, as stated above, any boater ignoring the posted warnings is not acting under authority of the United States. Thus, since the Government never altered the regulatory scheme, we agree with defendant: Plaintiff is in effect basing its claim on the ground that the United States did not alter the status quo for the benefit of plaintiff, and lacking such regulation, plaintiff now seeks indemnification from the United States due to the occurrence of an event the risk of which occurrence plaintiff assumed. However, the United States never ordered plaintiff to relocate its powerline; the United States is under no affirmative duty to prohibit the use of this reservoir by boats with masts or antennae that are too tall to negotiate under the powerline; and

plaintiff assumed the obligation of the continued safe operation of the powerline. Accordingly, under the circumstances here present, defendant's non-regulation of mast and antenna heights does not amount to an authorized interference with plaintiff's powerline, and no taking may be found. Plaintiff's claim really appears to be grounded on a contractual dispute regarding its obligation assumed under the December 7, 1951, easement agreement. As we have held before, contractual disputes seldom give rise to a taking. *J. J. Henry Co. v. United States*, 188 Ct. Cl. 39, 46, 411 F.2d 1246, 1249 (1969). The case at hand is no exception.

Plaintiff refers us to *Eyherabide v. United States*, 170 Ct. Cl. 598, 345 F. 2d 565 (1965), as an exception to the independent action rule. In *Eyherabide* the property at issue was a ranch surrounded on the east, west, and north by a naval gunnery range. Due to governmental activities on the gunnery range, the owner of the ranch could not hire a caretaker. As a result, vandals apparently destroyed some of the improvements on the ranch.[9] The court allowed a recovery against the United States due to the damage caused by the probable acts of vandals. However, *Eyherabide* is an extreme case and should not be considered a wide-reaching exception to the "independent action" rule. *Eyherabide* is inapposite to our facts; nor do we find the supporting cases cited on this point by plaintiff to be helpful (e.g., *Pete v. United States*, 209 Ct. Cl. 270, 531 F. 2d 1018

[9] Some of the damages complained of were not directly attributable to any single source. It was assumed these were probably acts of vandals.

(1976)). In *Eyherabide* there were repeated physical invasions of the property by the United States in the form of dropped fuel tanks and tow targets, entry of live shells and rockets, destruction of buildings and improvements from gunnery activities, and even actual directions from naval personnel that the then employed caretakers were to leave the premises (because the naval personnel mistakenly believed the property was part of the gunnery range.) It was only with relation to these actual and extreme direct physical invasions by the United States that the court was able to grant relief from the damages caused by the supposed vandals. Since the circumstances found to be appropriate to consideration of third-party acts in *Eyherabide* are wholly lacking in this case, we find it inappropriate to hold the United States responsible for the acts of the recreational sailboaters.

Plaintiff also relies on *United States v. Causby*, 328 U. S. 256 (1946), for the proposition that the Government has "reclaimed for its fee the [p]laintiff's interest in an elevation of twenty-five feet," which act destroyed the plaintiff's use and enjoyment of the air space above the reservoir. Again, the essential fact which is missing in the instant case is any direct governmental action. The finding of a taking in *Causby* flowed from acts of direct physical invasion of plaintiff's property by United States military aircraft flying outside the navigable air space (i.e., outside the public domain). The Government was held to have taken an avigation easement because the Civil Aeronautics Authority's approved glide path limited the utility of the plaintiff's property. A basis for the finding of the partial taking in

Causby was the governmental action—an element wholly lacking on our facts. As such, we are not persuaded *Causby* is of any assistance to plaintiff.[10] We have reviewed the remaining authorities relied on by the parties but find it unnecessary to discuss them in view of our disposition of the case on the above-described grounds.

CONCLUSION

It is concluded there was no taking by the United States. Accordingly, defendant's motion for summary judgment is granted, plaintiff's motion is denied, and the petition is dismissed.

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[10] *Griggs v. Allegheny County*, 369 U.S. 84 (1962), a case plaintiff referred us to at oral argument (and cited in its brief to the court) is inapposite to our facts as that case involved actual regulations which the respondent was required to adhere to (e.g., rules pertaining to airport approach standards) and which private pilots had to comply with. The result, as in *Causby*, was a finding of a taking by the low overflights.

APPENDIX B

GEORGIA POWER COMPANY v. THE UNITED STATES

No. 538-77

UNITED STATES COURT OF CLAIMS

Oct. 3, 1980

NICHOLS

Before NICHOLS, Judge, Presiding, KASHIWA and SMITH, Judges.

ORDER

This case comes before the court on plaintiff's motion, filed August 4, 1980, for rehearing en banc pursuant to Rules 7(d) and 151(b) with reference to the decision entered herein on July 16, 1980. Upon consideration thereof, together with the response in opposition thereto, without oral argument, by the seven active Judges of the court as to the suggestion for rehearing en banc under Rule 7(d), which suggestion is denied, and further having been so considered by the panel listed above as to the motion for rehearing under Rule 151(b),

IT IS ORDERED that plaintiff's said motion for rehearing be and the same is denied.

APPENDIX C

U.S. CONST. AMEND. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX D

16 U.S.C. § 460d

PUBLIC PARK AND RECREATIONAL FACILITIES AT WATER RESOURCE DEVELOPMENT PROJECTS

§ 460d. Construction and operation of public parks and recreational facilities in water resource development projects; lease of lands; preference for use; penalty; application of section 3401 of Title 18; citations and arrests with and without process; limitations; disposition of receipts

The Chief of Engineers, under the supervision of the Secretary of the Army, is authorized to construct, maintain, and operate public park and recreational facilities at water resource development projects under the control of the Department of the Army, to permit the construction of such facilities by local interests (particularly those to be operated and maintained by such interests), and to permit the maintenance and operation of such facilities by local interests. The Secretary of the Army is also authorized to grant leases of lands, including structures or facilities thereon, at water resource development projects for such periods, and upon such terms and for such purposes as he may deem reasonable in the public interest: *Provided,* That leases to nonprofit organizations for park or recreational purposes may be granted at reduced or nominal considerations in recognition of the public service to be rendered in utilizing the leased premises: *Provided further,* That

preference shall be given to Federal, State, or local governmental agencies, and licenses or leases where appropriate, may be granted without monetary considerations, to such agencies for the use of all or any portion of a project area for any public purpose, when the Secretary of the Army determines such action to be in the public interest, and for such periods of time and upon such conditions as he may find advisable: *And provided further*, That in any such lease or license to a Federal, State, or local governmental agency which involves lands to be utilized for the development and conservation of fish and wildlife, forests, and other natural resources, the licensee or lessee may be authorized to cut timber and harvest crops as may be necessary to further such beneficial uses and to collect and utilize the proceeds of any sales of timber and crops in the development, conservation, maintenance, and utilization of such lands. Any balance of proceeds not so utilized shall be paid to the United States at such time or times as the Secretary of the Army may determine appropriate. The water areas of all such projects shall be open to public use generally for boating, swimming, bathing, fishing, and other recreational purposes, and ready access to and exit from such areas along the shores of such projects shall be maintained for general public use, when such use is determined by the Secretary of the Army not to be contrary to the public interest, all under such rules and regulations as the Secretary of the Army may deem necessary including but not limited to prohibitions of dumping and unauthorized disposal in any manner of refuse, garbage, rubbish, trash, debris, or litter of any kind at such water resource development projects, either into the waters

of such projects or onto any land federally owned and administered by the Chief of Engineers. Any violation of such rules and regulations shall be punished by a fine of not more than $500 or imprisonment for not more than six months, or both. Any persons charged with the violation of such rules and regulations may be tried and sentenced in accordance with the provisions of section 3401 of Title 18. All persons designated by the Chief of Engineers for that purpose shall have the authority to issue a citation for violation of the regulations adopted by the Secretary of the Army, requiring the appearance of any person charged with violation to appear before the United States magistrate, within whose jurisdiction the water resource development project is located, for trial: and upon sworn information of any competent person any United States magistrate in the proper jurisdiction shall issue process for the arrest of any person charged with the violation of said regulations; but nothing herein contained shall be construed as preventing the arrest by any officer of the United States, without process, of any person taken in the act of violating said regulations. No use of any area to which this section applies shall be permitted which is inconsistent with the laws for the protection of fish and game of the State in which such area is situated. All moneys received by the United States for leases or privileges shall be deposited in the Treasury of the United States as miscellaneous receipts.

APPENDIX E

311.0 *Determination of the Secretary.* The Secretary of the Army having determined that use of the Clark Hill and Hartwell Reservoir areas by the general public for boating, swimming, bathing, fishing, and other recreational purposes will not be contrary to the public interest and will not be inconsistent with the operation and maintenance of the reservoir for its primary purposes, hereby prescribes the following rules and regulations pursuant to the provisions of Section 4 of an Act of Congress approved December 22, 1944 (58 Stat. 889; 16 U.S.C. 460d) as amended by the Flood Control Act of 1946 (60 Stat. 641) and Section 209 of the Flood Control Act of 1954 (68 Stat. 1266) for the public use of the Clark Hill and Hartwell Reservoirs.

311.3 *Boats and other vessels, private.*

(a) The operation of boats, houseboats, cabin cruisers and other vessels on the reservoir for fishing and recreational use is permitted except in prohibited areas designated by the District Engineer in charge of the reservoir area and subject to the regulations contained in this part.

(b) A permit shall be obtained from the District Engineer or his authorized representative for placing and operating a boat or other vessel on the reservoir for any one period longer than three days. No charge will be made for this permit. The permit shall be kept aboard the vessel at all times that the vessel is in operation on the reservoir. The District Engineer in charge of the area or his authorized repre-

sentative shall have authority to revoke the permit and to require removal of the vessel upon failure of the permittee to comply with the terms and conditions of the permit or with the regulations in this part.

(c) Unsafe boats or other vessels will not be permitted on the reservoirs. The District Engineer may require the applicant for a permit to furnish the construction plans and other information pertaining to the construction and equipment of the boat or other vessel prior to issuing a permit for its operation on the reservoirs. All boats permitted on the reservoir shall be equipped for safe operation and operated in a safe manner in accordance with instructions issued by the District Engineer. These instructions may provide that the operation of speed boats and water skiing activities shall be confined to areas of water designated by the District Engineer for such activities.

(d) Boathouses, houseboats, cabin cruisers and other vessels may be placed and operated on the reservoirs, except that such facility shall not be utilized for human habitation at a fixed or permanent mooring point and if equipped with toilets and galleys shall not be placed on reservoirs with small permanent pools. Such vessels may be barred from other reservoirs by the District Engineer with the concurrence of the Chief of Engineers in those reservoirs in which the waters thereof are used for domestic water supply when the District Engineer determines that such use is contrary to the public health and safety.

APPENDIX F

§ 327.0 Applicability.

The regulations covered in this Part 327 shall be applicable to all water resource development projects administered by the Chief of Engineers. All other Federal, State, and local laws and regulations remain in full force and effect where applicable to those water resource development projects. These regulations do not apply to those water resource development projects regulated jointly with other Federal agencies to which Parts 313 and 322, Chapter III, Title 36, Code of Federal Regulations apply.

§ 327.3 Vessels.

(a) It shall be a violation of these regulations to operate any vessel for a fee or profit upon the waters of water resource development projects unless such operation is authorized by lease, license or concession contract with the Department of the Army. This paragraph shall not apply to the operation of vessels upon navigable waters of the United States.

(b) No vessel shall be operated in prohibited areas of a lake, reservoir, or other body of water. Such areas shall be designated by the District Engineer and marked by the posting of appropriate signs.

(c) No person shall operate any vessel or manipulate any water skis or other similar device in a careless, negligent, or reckless manner so as to endanger any person or property.

(d) The construction of floating or stationary

mooring facilities or any other structure of any kind in the lake, reservoir, or other body of water is prohibited unless a permit therefor has been issued by the District Engineer. No habitation of such facilities will be permitted.

(e) All vessels when not in actual use shall be removed from the lake, reservoir, or other body of water unless securely moored at mooring facilities permitted by the District Engineer.

CERTIFICATE OF SERVICE

This is to certify that I have served the within and foregoing Petition for Writ of Certiorari upon the Respondent by depositing three copies of the same in a United States post office, first-class postage prepaid, respectively, to: The Solicitor General, Department of Justice, Washington, D.C. 20530; and Patricia N. Young, Department of Justice, Washington, D.C. 20530.

This ____ day of December, 1980.

ROBERT L. PENNINGTON
Counsel of Record for Petitioner

No. 80-1047

FEB 11 1
ALEXANDER L. S
CLERK

In the Supreme Court of the United States

JANUARY TERM, 1981

GEORGIA POWER COMPANY, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

JANUARY 1981

No. 80-1047

GEORGIA POWER COMPANY, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

QUESTION PRESENTED

Whether the United States is obligated to pay just compensation to an electric utility when hazards stemming from navigation of privately owned sailboats on an Army Corps of Engineers reservoir induce the utility to raise the height of power lines traversing the reservoir.

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OPINION BELOW

The opinion of the Court of Claims (Pet. App. 1a-12a) is reported at 633 F. 2d 554.

JURISDICTION

The judgment of the Court of Claims was entered on July 16, 1980. A petition for rehearing was denied on October 3, 1980 (Pet. App. 1b). The petition for a writ of certiorari was filed on December 24, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

STATEMENT

The Clark Hill Reservoir was constructed as part of a project in the Savannah River Basin authorized by Congress in 1944; a project report approved by Congress in 1946 indicated that it was to serve multiple purposes, including the production of hydroelectric power and the improvement of navigation (Pet. App. 2a n.1). The project was planned and operated by the Army Corps of Engineers; and recreational uses, including boating, were part of the master plan published in September 1950 (Exh. M).

Petitioner owned an electrical power transmission line traversing lands to be condemned for the project. Following discussions with the Corps in 1950 and 1951, petitioner entered into an agreement with the Corps, on February 26, 1951, providing for relocation of the line. The easement then traversed by the power line was conveyed to the United States; the United States, in exchange, provided an easement over other portions of the project and paid petitioner $232,800 for the cost of moving the line (Pet. App. 4a, 6a). The agreement contained a "hold harmless" clause relieving the United States of any liability in connection with the construction and operation of the power line at its new location (Exh. I).

The February 1951 agreement contemplated execution of an easement agreement, and such an agreement was entered into by petitioner and the United States on December 7, 1951 (Pet. App. 4a). This latter agreement granted petitioner an easement "for the construction, operation and maintenance of an electrical transmission line" over the project area; the easement was subject to a number of conditions, including (1) a clause relieving the United States of any liability for personal injuries or property damage incident to the construction, maintenance, or use of the line; (2) a clause requiring petitioner to inspect the line periodically and, at its own expense, keep it free of defects; and (3) a clause providing that use and occupation of the lands over which the easement was granted were to be subject to rules and regulations promulgated by the District Engineer of the Corps of Engineers with regard to public safety and other matters (Pet. App. 7a).

Neither the February 1951 agreement nor the December 1951 agreement specified the height at which the line was to be built (Pet. 3). Petitioner constructed the new line at the height of 25 feet above the reservoir, a height consistent with the National Electric Safety Code. This height was chosen with the acquiescence of the Corps, although not at its command (Pet. 3; Pet. App. 6a-7a & n.6).

The Corps did not, at the time of the 1950-1951 negotiations, regulate the height of the masts or antennas on sailboats that might use the reservoir nor has it since promulgated any such height restrictions (Pet. App. 6a). In recent years, boats with masts or antennas exceeding 25 feet have sailed on the reservoir. A near collision with the power line occurred in 1971, and in 1973 a passenger in a sailboat was killed when the boat's mast struck the power line (*id.* at 2a). Following the 1971 incident, the Corps of Engineers asked petitioner to consider raising the power line; petitioner at that time declined to do so unless the United States would

underwrite the expense (Pet. 4). The Corps did not then, or at any time thereafter, order petitioner to move its line (Pet. App. 9a). The Corps took precautionary action on its own, posting buoys and signs and marking navigational maps to warn of the hazard to boats, although the line did not cross any of the main navigation channels (*id.* at 8a).

On February 24, 1977, the Corps formally advised petitioner that the United States would not bear the cost of raising the power line (Exh. AA). Later that year petitioner raised the line to a height of 54 feet; and on November 4, 1977, filed its petition in the Court of Claims seeking reimbursement of the cost of raising the line (Pet. App. 2a; Pet. 8). It asserted that the failure of the Corps of Engineers to issue regulations prohibiting use of the reservoir by boats with masts or antennas exceeding 25 feet in height constituted a taking of its power line easement within the meaning of the Fifth Amendment of the Constitution and entitled it to just compensation (Pet. App. 1a-2a).

The Court of Claims, granting summary judgment in favor of the United States, dismissed the petition (Pet. App. 12a). It held that there was no taking because the events that induced petitioner to raise it power line were the actions of independent third parties—the sailboat owners—not of the government (*id.* at 4a-6a). The court noted (*id.* at 8a-9a) that the warnings posted by the Corps made sailing in the area of the line an action that exceeded any authority granted by the government to sail on the reservoir. The court construed the 1951 easement agreement as placing on petitioner the risk of the line's becoming a hazard and the attendant expense of alleviating any such hazardous condition (*id.* at 7a-8a). It found no obligation on the part of the government to alter its original regulatory scheme so as to ban boats with given mast or antenna heights from the reservoir (*id.* at 9a-10a).

ARGUMENT

The decision of the Court of Claims is correct and conflicts with no decision of this Court or of any court of appeals. It is, moreover, of limited significance, turning largely on the construction of the terms of a particular contract. It accordingly does not warrant review by this Court.

1. The determination of whether government action constitutes a "taking" for purposes of the Fifth Amendment depends on an "essentially ad hoc" examination of the facts in the particular case. *Penn Central Transportation Co.* v. *New York City,* 438 U.S. 104, 124 (1978). One factor of crucial importance to this inquiry is whether the government action has interfered with "distinct investment-backed expectations." *Ibid.*

Given the terms of the two agreements involved here, petitioner cannot have had either distinct or reasonable expectations that a change of circumstances making its power line possibly hazardous at a height of 25 feet would cast upon the United States the obligation of paying for whatever alterations were necessary to make the line safe. Petitioner assumed all tort liability in connection with the line and the duty of inspecting it and keeping it free of defects. The agreement did not specify 25 feet as a height at which the line could safely be maintained in perpetuum and did not guarantee that the types of boats used for recreational sailing would never change or that the Corps, contrary to its policy at the time the agreements were negotiated, would begin specifying maximum heights for antennas and masts on boats using the lake. In sum, the risk of making a judgment about the power line's optimum height that would prove erroneous in the long term was petitioner's.

The easement agreement did provide, however, that petitioner's easement would be subordinated to the requirements of navigation, especially those relating to safety (see page 2, *supra*). This Court in *Kaiser Aetna* v. *United States*, 444 U.S. 164 (1979), made clear the significance of such a condition. It held that the government, after allowing the owners of a pond to dredge and improve the property in connection with a project linking the pond to navigable waters, was required to compensate the owners if it sought to create a right of public access to the improved pond; but the Court noted (444 U.S. at 179) that the result would have been different had the government "conditioned its approval of the dredging on petitioner's agreement to comply with various measures that it deemed appropriate for the promotion of navigation." Thus, under the terms of the agreement and settled law, the United States retained the power to regulate the height of the line as the needs of navigational safety dictated, and such regulation, if rationally related to those needs, would not constitute a taking.

2. As the Court of Claims correctly found, however (Pet. App. 9a), the United States never did exercise this regulatory option to require petitioner to move its line. Rather, by placing buoys and warning signs and by marking the hazard on navigational maps, the Corps of Engineers made it clear to those who sailed on the reservoir that venturing out of the main navigation channels into the areas crossed by the line was unauthorized and hazardous.[1] Petitioner was

[1]Because the government not only did not affirmatively authorize the sailing of high-masted boats in the areas crossed by petitioner's power line but expressly warned against such action, this case is unlike *Griggs* v. *Allegheny County*, 369 U.S. 84 (1962), on which petitioner heavily relies (Pet. 12, 16, 22-23). In *Griggs*, the county actually leased the easements in question to various airlines for landings and take-offs (369 U.S. at 86), and the use of those easements by airplanes destroyed nearby homeowners' quiet enjoyment of their property.

United States v. *Causby*, 328 U.S. 256 (1946), on which petitioner also relies (Pet. 17-18), involved low overflights by military airplanes

impelled to move its line because of its concern about the actions of private boaters who might disobey the government's warnings, not because of any government command that petitioner relocate the line.

Thus, as the Court of Claims held (Pet. App. 4a-6a), even assuming that petitioner had a vested right, as against direct interference by the government, to maintenance of its line at a height of 25 feet, it had no right to recover compensation in these circumstances, where the interference came from third parties. See *Miller* v. *United States,* 583 F. 2d 857, 864-865 (6th Cir. 1978) (United States not responsible for flooding of property resulting from operation of dams and locks owned by Canada, even though the United States, through treaties, allowed Canada to build the structures); *Minot* v. *United States,* 546 F. 2d 378, 381 (Ct. Cl. 1976) (United States incurred no Fifth Amendment liability when a local power authority, acting pursuant to an irrevocable permit from the United States, erected a power line on an easement of the United States crossing private lands).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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and is therefore distinguishable because it was a case of the government itself making use of other persons' property. See *Penn Central Transportation Co.* v. *New York City, supra,* 438 U.S. at 128.

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